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8                   UNITED STATES DISTRICT COURT  
9                   WESTERN DISTRICT OF WASHINGTON  
10                  AT TACOMA

11 JUANITA ERMEY,

12                  Plaintiff,

13                  v.

14 MICHAEL J. ASTRUE, Commissioner of  
15                  Social Security Administration,

16                  Defendant.

17                  CASE NO. C08-5537JKA

18                  ORDER REMANDING  
19                  ADMINISTRATIVE DECISION

20                  This matter has been referred and reassigned to the undersigned Magistrate Judge pursuant to 28  
21 U.S.C. § 636(c). This matter has been fully briefed. Plaintiff brings this action pursuant to 205(g) of the  
22 Social Security Act ("the Act"), as amended, 42 U.S.C. § 405(g), to obtain judicial review of the  
23 defendant's final decision. Plaintiff's Opening Brief raise the following questions:

- 24                  (i) whether Ms. Ermey's migraine headaches are "severe" at Step 2 of the sequential evaluation;  
25                  (ii) whether the ALJ provided legally adequate reasons for finding Ms. Ermey's testimony not  
26 credible;  
27                  (iii) whether the ALJ was required to consider the affidavit by Ms. Ermey's father;  
28                  (iv) whether the ALJ's reasons for rejecting Dr. Miklos' opinions of limitation were clear and  
convincing;  
                (v) whether the ALJ's reasons for rejecting Dr. Neims' opinions of functional  
limitations were clear and convincing;

1                         (vi) whether the ALJ's summary of mental limitation in his RFC is supported by  
2 substantial evidence, including Dr. Gregg's opinion of specific limitations;

3                         (vii) whether the job of hotel housekeeper can be performed by an individual with  
4 Ms. Ermey's limitations; and

5                         (viii) whether the record is complete or further development is needed.

6                         This Court must uphold the determination that plaintiff is not disabled if the ALJ applied the  
7 proper legal standard and there is substantial evidence in the record as a whole to support the decision.  
8 Hoffman v. Heckler, 785 F.2d 1423, 1425 (9th Cir. 1986). Substantial evidence is such relevant evidence  
9 as a reasonable mind might accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S.  
10 389, 401 (1971); Fife v. Heckler, 767 F.2d 1427, 1429 (9th Cir. 1985). It is more than a scintilla but less  
11 than a preponderance. Sorenson v. Weinberger, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975); Carr v.  
12 Sullivan, 772 F. Supp. 522, 525 (E.D. Wash. 1991). If the evidence admits of more than one rational  
13 interpretation, the Court must uphold the Secretary's decision. Allen v. Heckler, 749 F.2d 577, 579 (9th  
14 Cir. 1984).

15                         After carefully reviewing the record, the court finds and orders as follows:

16                         (1) The ALJ erred when he considered plaintiff's impairments at step-two in the administrative  
17 review process. Step-two of the administration's evaluation process requires the ALJ to determine  
18 whether an impairment is severe or not severe. 20 C.F.R. §§ 404.1520, 416.920 (1996). An impairment is  
19 "not severe" if it does not "significantly limit" the ability to do basic work activities. 20 C.F.R. §§  
20 404.1521(a), 416.921(a). The Social Security Regulations and Rulings, as well as case law applying  
21 them, discuss the step-two severity determination in terms of what is "not severe." According to the  
22 Commissioner's regulations, "an impairment is not severe if it does not significantly limit [the claimant's]  
23 physical ability to do basic work activities," 20 C.F.R. §§ 404.1520(c), 404.1521(a)(1991). Basic  
24 work activities are "abilities and aptitudes necessary to do most jobs, including, for example, walking,  
25 standing, sitting, lifting, pushing, pulling, reaching, carrying or handling." 20 C.F.R. § 140.1521(b);  
26 Social Security Ruling 85- 28 ("SSR 85-28"). An impairment or combination of impairments can be  
27 found "not severe" **only** if the evidence establishes a slight abnormality that has "no more than a minimal  
28 effect on an individuals ability to work." See SSR 85-28; Yuckert v. Bowen, 841 F.2d 303, 306 (9th

1 Cir.1988)(adopting SSR 85-28)(emphasis added).

2 Here, the ALJ erred when he did not consider Plaintiff's migraine headaches a severe impairment  
3 at step-two. Ms. Ermey's migraine headaches are medically documented by Dr. Flynn, chief of neurology  
4 at Madigan. He noted that she gets 2-3 migraine headaches per month when taking Imitrex, but they had  
5 been more frequent in the past year because she had been prescribed Zomig, which is less effective than  
6 Imitrex. (Tr. 270-272). Ms. Ermey argues the headaches significantly affect her ability to work. To  
7 support her argument, in September 2005 Dr. Flynn's notes that the headaches occur 2-3 times per month.  
8 Id. Oddly, defendant argues Dr. Flynn's records support the ALJ's decision not finding any severe  
9 impairment caused by the migraines. Defendant argues, "The note in question actually states that Ms.  
10 Ermey had been '[treated] effectively with Imitrex 100 mg. as abortive' treatment. Tr. 270."

11 The undersigned is not persuaded by Defendant's contention. When read in its entirety Dr.  
12 Flynn's report fully supports Plaintiff's claim that she is impacted, more than minimally, by migraine  
13 headaches. Dr. Flynn's notes read:

14 38 y.o. RHF with a HX of migraines diagnosed in 1998. She had been Tx effectively with  
15 Imitrex 100 mg as abortive Tx, but when she moved to Ft. Lewis she said she was told she  
16 would have to take Zomig or see a Neurologist. She tried Zomig but it was not as  
17 effective as Imitrex. **She gets 2-3/mo when on Imitrex and more without it.** She  
18 develops an aura of "numb pain" in her R eye followed by white flashes, photo and  
19 sonophobia, N&V, and a throbbing H.A. She lies down in a dark quiet room with a cold  
20 compress over her head and takes phenegran followed by Imitrex when this happens. She  
21 said that she had never been placed on a prophylactic but she is on elavil 10 mg 'for sleep'.  
22 Tr. 270 (emphasis added).

23 The evidence presented by Plaintiff satisfies the "de minimis" step-two standard. The medical  
24 evidence clearly supports finding a "severe" impairment at step-two, as the term is defined by the Ninth  
25 Circuit. In sum, the ALJ erred when he did not consider Plaintiff's migraine headaches as being a  
26 "severe" at step two in the five step evaluation process.

27 (2) Having found above that the ALJ erred when he evaluated plaintiff's impairments at step-two,  
28 the matter must be remanded to the administration to reconsider the step-two issue and to appropriately  
complete the five-step evaluation process in light of the additional severe impairment. Reconsideration,  
by a different ALJ, shall include a complete review and analysis of the medical opinion evidence,  
Plaintiff's testimony, and the lay witness evidence.

(3) Accordingly, the Court REMANDS the Social Security Administration's final decision for

1 further consideration with the additional direction that it be assigned to different Administrative Law  
2 Judge.

3 The clerk is directed to send copies of this Order to counsel of record.

4 DATED this 2nd day of March, 2009.

5 /s/ J. Kelley Arnold  
6 J. Kelley Arnold  
7 U.S. Magistrate Judge  
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